2d Civil No. B183426 consolidated with B186025

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BILLY BLANKS, GAYLE BLANKS, and
BG STAR PRODUCTIONS, INC.,

Plaintiffs and Respondents,

v.

SEYFARTH SHAW LLP and WILLIAM H. LANCASTER,

Defendants and Appellants.

Appeal from the Superior Court of California, County of Los Angeles
Honorable Susan Bryant-Deason
Superior Court Case No. BC 308 355

APPELLANT SEYFARTH SHAW LLP'S REPLY BRIEF

Service on Attorney General and District Attorney of Los Angeles County
required by Business & Professions Code § 17209

MOSCARINO & CONNOLLY LLP
John M. Moscarino (SBN 122105)
Joseph Connolly (SBN 53329)
Paula C. Greenspan (SBN 166332)
11911 San Vicente Blvd., Suite 324
Los Angeles, California 90049
310-471-4500 / Fax 310-471-4558

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland (SBN 51413)
Barbara W. Ravitz (SBN 86665)
Peter O. Israel (SBN 50806)
Alana B. Hoffman (SBN 236666)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3626
310-859-7811 / Fax 310-276-5261

Attorneys for Defendant and Appellant
SEYFARTH SHAW LLP

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

Page

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

Seyfarth Shaw LLP has experienced one of the most catastrophic events that can befall a law firm: It has wrongfully been held liable on a multi-million-dollar malpractice claim, with findings of intentional wrongdoing adding $15,000,000 in punitive damages. Ironically, analysis of respondents' brief *confirms* that the judgment resulted from pervasive error, since respondents refuse to meet Seyfarth's arguments head-on and the responses they do make are patently meritless. This "change the subject" technique is exemplified by respondents' approaches to each of Seyfarth's major issues:

1. **TAA Severability.** The central premise of this lawsuit was that the TAA is "a gift from the legal gods," so that proof of TAA violations generating $3,334 in commissions results in automatic disgorgement of $10,600,000 in lawfully-earned compensation. However, that premise is destroyed if the rule of contract severability mandated by Civil Code section 1599 applies in the TAA context; and if severability does not apply, then the TAA's extraordinary financial penalties violate due process. Rather than demonstrating any clear legislative intent to abrogate section 1599, or explaining how a forfeiture of such magnitude can be constitutionally justified, respondents point to ambiguous language in a report prepared by a committee of non-legislators—a report there is no indication any legislator even read, much less adopted as legislative history.

2. **Trial-within-a-trial.** Dismissing this Court's *Mattco Forge* decision, respondents do not seriously contend they bore their burden of demonstrating causation by presenting the requisite "trial-within-a-trial." Instead, they try to justify each of the trial court's rulings separately, without reference to the bigger picture, as if doing so could fill the gaping hole left by the missing "trial-within-a-trial."

3. **Punitive Damages.** Unable to point to any evidence that anyone at Seyfarth with policy-making authority (i.e., any "managing agent") knew of the alleged "churning" scheme, respondents argue principally that the managing agent rules protect only formally-organized corporations, and that all partnerships and other employers are liable for punitive damages if even the newest low-level partner commits misconduct without any knowledge of management. Not only does no authority support this revolutionary suggestion, all authority is directly contrary.

It is past time for Seyfarth's nightmare to be over. The judgment must be reversed with directions to enter judgment for Seyfarth.

ARGUMENT

I. SEVERABILITY APPLIES TO THE TAA.[1]

A. Plaintiffs Ignore Section 1599 And Rules Of Statutory Interpretation.

Seyfarth demonstrated that the doctrine of contract severability, codified in Civil Code section 1599, applies to the TAA and specifically to the Blanks/Greenfield contract. (SAOB 12-16.) Plaintiffs' 156-page respondents' brief does not even mention section 1599.

Section 1599 cannot be ignored: "The law of contract severability is stated in Civil Code section 1599," which since 1872 has provided: "'Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.'" (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 137.) Severability was recognized as "both familiar and declared law" almost a century ago. (*Hedges v. Frink* (1917) 174 Cal. 552, 554-555.)

Section 1599 applies severability to every type of contract, and that statute prevails unless specifically abrogated by the Legislature. (See *In re Matthew C.* (1993) 6 Cal.4th 386, 394 [abrogation of existing right "must be clearly stated"]; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569 ["The law shuns repeal by implication"].) This is particularly so when the existing right is one of basic, codified contract law. (E.g., *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277-278 [because statute concerning settlement offers is "completely silent" on

---

[1] This issue is pending in the California Supreme Court. (*Marathon Entertainment, Inc. v. Blasi*, No. S145428, review granted 9-20-06.)

revocation, "well-established principle of contract law" governing revocation (Civ. Code, § 1586) applies fully to settlement offers].)

The TAA is "completely silent" on contract severability, and there is a "well-established principle of contract law," codified in section 1599 and affirmed by a century of cases, that the lawful parts of a contract with more than one object may be valid and enforceable, even if the unlawful parts are not. As in *T.M. Cobb Co.*, if the Legislature had intended to abrogate this principle in the TAA setting, "it would have expressly and unequivocally said so," with "unmistakable clarity." (*Id*. at p. 278 & fn. 5.) It did not.

B. Plaintiffs Misread The CEC Report And Mistakenly Equate It With Legislative History.

Plaintiffs contend that "[a]greements under the TAA are not severable," that "mandatory" and "total disgorgement is the rule under the TAA," and that "[l]egislative history . . . confirms this conclusion." (RB 44-45, 57-58.) As "legislative history," plaintiffs cite two sentences from the 42-page, 1986 report of the California Entertainment Commission (CEC). (RB 44-45, 57; see RJN-ARB, pp. 1-42.)[2] Plaintiffs' approach has multiple flaws.

First, it assumes the TAA is ambiguous, permitting resort to "legislative history." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055 [only when statutory language "is susceptible to more than one reasonable construction is it appropriate to turn to . . . the legislative history of the measure"].) But there's no ambiguity; the TAA is

---

[2] Unlike plaintiffs, we request judicial notice of the CEC report, as well as of documents from the TAA's actual legislative history. (See accompanying Request for Judicial Notice [RJN-ARB].) Our earlier judicial notice request is cited as RJN-AOB.

silent on severability, indicating legislative *adoption* of the general principle.

Second, the CEC report language is not authoritative legislative history: the Legislature adopted only the committee's *recommendations*, not its accompanying explanations. Indeed, nothing in the actual legislative history suggests any legislator was even aware of anything in the report beyond its recommendations. Typical is the Bill Analysis of the Department of Industrial Relations, which oversees the Labor Commissioner's enforcement of the TAA, stating AB 3649 "reflects the *basic recommendations* of the [CEC]'s report." (RJN-ARB, p. 45, emphasis added; see also RJN-ARB, pp. 46, 49, 50, 55, 59 [reflecting legislators' reliance only on report's *recommendations*].) With no indication lawmakers even read the CEC report, it can provide no insight whatsoever into "how the measure was understood at the time by those who voted to enact it." (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7.)[3]

Third, even if the CEC report *were* legislative history, it does not unambiguously reject severability.[4] For example, the words "power" in the

---

[3] Although a few courts have treated the CEC report as legislative history (e.g., *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 256-259), none considered whether it *is* legitimate legislative history.

[4] The relevant portion of the report reads:

> The majority of the Commission believes that existing civil remedies, which are available by legal action in the civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the Act and punishing breaches. These remedies include actions for breach of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation, infliction of emotional distress, and

(continued...)

third sentence quoted and "empowered" in the next undercut any notion that declaring a contract entirely void is always automatic. That the Labor Commissioner has the "power" to impose contract-voidance—not the duty, only the authority—means the Commissioner "*may*"—or may not—"declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 55, emphasis added.) Voidance *ab initio* of the entire contract is optional.

Moreover, the Commissioner's power to "declare any contract entered into between the parties void from the inception" is open to multiple meanings. *Any* contract? A hybrid contract for unlawful procurement services and lawful business services? There is no indication the CEC's references to contracts and services meant anything other than contracts for unlawful TAA services. At best unclear, the phrase cannot reasonably serve to indicate a legislative intent to nullify section 1599 whenever there is a TAA licensing violation. (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 331 [where legislative history "unclear" on Legislature's intent to depart from well-settled doctrine, courts "cannot

---

[4] (...continued)

> the like. Perhaps the most effective weapon for assuring compliance with the Act is the *power* of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare any contract entered into between the parties void from the inception and order the restitution to the artist, for the period of the statute of limitations, of all fees paid by the artist and the forfeiture of all expenses advanced to the artist. If no fees have been paid, the Labor Commissioner is *empowered* to declare that no fees are due and owing, regardless of the services which the unlicensed talent agent may have performed on behalf of the artist.

(RJN-ARB, pp. 20-21, emphases added.)

read that intent into the statute"]; *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578 ["wisest course is to rely on legislative history only when that history itself is unambiguous"].)

Citing no statutory, legislative history or decisional support, plaintiffs assert that the TAA's one-year statute of limitations was enacted in 1986 to go "hand-in-hand" with and somehow ameliorate the unfairness of the remedies plaintiffs claim the 1986 CEC report endorsed. (RB 57-58.) But the statute of limitations was added in *1982*, not 1986. (RJN-ARB, pp. 60, 62.) In any event, forfeiture of even one-year's worth of income can be a draconian penalty. (See below, § I.E. [Blankses paid Greenfield nearly $10,600,000 in previous year for lawful services].)

To presume a legislative intent to abrogate the long-codified doctrine of severability, based on two ambiguous sentences buried in the middle of a report written by non-legislators—sentences no legislator is likely to have read—is ludicrous.

C. Plaintiffs Disregard The Labor Commissioner's Regular Application Of Severability.

Although plaintiffs cite several Labor Commissioner determinations, they skip the one that expressly concludes severability fully applies to the TAA. The Commissioner's interpretation of the TAA "deserves substantial weight," since it is the "statute he is charged with enforcing." (*Styne, supra,* 26 Cal.4th at p. 53.)

In *Almendarez v. Unico Talent Management, Inc.* (Cal.Lab.Com., Aug. 26, 1999) No. TAC 55-97, the Commissioner expressly applied severability in the TAA context. (RJN-AOB, pp. 21-24.) Citing section 1599 and case law, the Commissioner found a contract between an unlicensed manager and an artist "both legal in part [providing for repayment of manager's loans to artist] and illegal in part [providing for

commissions for procurement]." (*Id.* at pp. 21-22.) "To hold otherwise," the Commissioner determined, "would undermine the intent of the parties, result in an inequitable holding, produce an injustice and allow a contract to be enforced which violates public policy." (*Id*. at p. 22.)

Almendarez is no aberration. The Commissioner recently affirmed his endorsement of severability in *Danielewski v. Agon Investment Co.* (Cal.Lab.Com., Oct. 28, 2005) No. TAC 41-03, RJN-ARB, pp. 65, 91 ("*Almendarez* provides the right template").

Even more recently, the Commissioner's amicus brief filed in *Marathon* (of which this Court has taken judicial notice) acknowledged the Commissioner has applied severability in TAA decisions. Although the brief contends the Commissioner consistently follows the "rule" of voiding entire contracts, it acknowledges the Commissioner has carved out "exceptions to the general rule," including in *Almendarez*. (Commissioner's brief, pp. 31-34.)

Two points are striking:

First, the Commissioner's acknowledged authority to apply severability in exceptional cases can come only from the TAA itself and Civil Code 1599. If the Commissioner is authorized to sever contracts involving "loan repayments or anomalous situations" (Commissioner's brief, p. 34) under section 1599, the Commissioner may also do so with respect to all contracts having distinct lawful and unlawful objects.

Second, the Commissioner ignores the actual language of *Almendarez* and the solid legal authorities relied on there:

> The California cases take a very loose view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law (as the court conceives it) would be furthered. . . . The courts have held . . . that "where the consideration is only partly illegal and the agreement is severable, the legal portion may be enforced. . . ." Similarly, if the contract has several distinct

> objects, of which at least one is lawful, the contract is valid and enforceable as to the lawful object, provided that this is clearly severable from the rest.

(*Almendarez, supra,* RJN-AOB, pp. 21-22, citations omitted.)

When acting as the decision maker in actual cases, the Commissioner well understands that severability applies to the TAA. Any efforts to undercut that position when purporting to act as an "amicus" deserve little weight.

D. Plaintiffs Misinterpret The Case Law On Severability.

1. No case bars TAA severability across the board.

Plaintiffs claim *Yoo v. Robi* (2005) 126 Cal.App.4th 1089—the only published decision to address the issue of severability of TAA-regulated contracts—recognized a "bright-line remedy" of non-severability. (RB 45-46 & fn. 20, 61.) Not so.

In *Yoo,* an unlicensed manager's "'primary and principal activity'" for a singer was to procure engagements. (*Id.* at pp. 1096, 1100, fn. 13.) The court declined to sever the contract to permit the manager to receive a portion of commissions earned from procuring a recording contract, for which no license was required. It explained:

> [A]lthough Civil Code section 1599 authorizes a court to sever the illegal object of a contract from the legal it does not require the court to do so. The decision whether to sever the illegal term of a contract is informed by equitable considerations. Here the trade-off is an unbargained for benefit to Robi (he receives a service he does not have to pay for) versus a dilution of the deterrent effect of invalidating the entire contract (managers will be more careful to avoid unlawful activities if they know they will not get paid for the lawful ones). For the reasons discussed above, we believe the public policy underlying the Act is best effectuated by denying all recovery, even for activities which did not require a talent agency license.

(*Id.* at p. 1105, footnotes omitted.)

The first two sentences acknowledge the fundamental discretionary and equitable nature of severability under section 1599. The third sentence applies the equitable considerations to the facts of the case.

Plaintiffs misread the last sentence, which concludes that recovery should be denied in that case, to hold that severability is unavailable in *all* TAA cases. (RB 46-47.) But that ignores the first three sentences and the equitable, case-by-case, nature of severability. It also ignores the fact that the manager's "'primary and principal activity'" was procurement, rendering any broad pronouncement as to other factual scenarios mere dicta. And it ignores the court's use of the verb "did" rather than "do" in the last sentence, and its use of the party's name ("Robi") in the third sentence, both making clear the court had the specific case in mind.

2. Licensing-statute cases control here.

Courts frequently have applied severability to contracts regulated by business-licensing statutes, most notably in *Birbrower, supra*, 17 Cal.4th at p. 129, where the Supreme Court held severability applicable to a contract violating California's lawyer-licensing statute. Plaintiffs contend *Birbrower* did not involve "a remedial scheme like the TAA." (RB 48.)

Nonsense. *Birbrower* itself explained it was addressing a "comprehensive scheme regulating the practice of law," designed "to protect the public from those giving unauthorized legal advice and counsel." (*Id.* at pp. 127, 129.) That scheme prescribes specific remedies for the unlicensed practice of law. (Bus. & Prof. Code, § 6126.5.)

Plaintiffs' attempts to limit *Birbrower* to its facts also fail. The case deals broadly with "[t]he law of contract severability [as] stated in Civil Code section 1599." (17 Cal.4th at pp. 137-139.) Moreover, *Birbrower* has frequently been applied in other factual settings. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 196.)

The Courts of Appeal, too, have held it appropriate to sever contracts made by unlicensed persons. In *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 894, for example, an unlicensed real estate broker sought fees for locating four potential acquisitions. The Court of Appeal denied recovery for transactions where he acted as broker, but permitted recovery for transactions where he acted as "finder," which did not require a license. (*Ibid*.) The court explained: "The goal of the licensing law is adequately served by denying Lindenstadt any compensation on those transactions where he crossed the line from finder to broker." (*Ibid*.)

Similar are *Broffman v. Newman* (1989) 213 Cal.App.3d 252, 261 (unlicensed real estate broker's contract severed because "only a portion of Newman's activities involved leasing offices and collecting rent") and *Southfield v. Barrett* (1970) 13 Cal.App.3d 290, 294-295 (unlicensed commission merchant's contract severed because "the penalty resulting

from denial of relief would be disproportionately harsh in relation to the violation involved").[5]

3. The "central purpose" test requires severance here.

Courts have held that severability turns on a contract's "central purpose." If the illegal provision is collateral to that purpose, the contract is severable. The "overarching inquiry" is whether severability will serve the interests of justice. (SAOB 12-13, 15; RB 50.) Undisputed evidence established that the central purpose of the Blanks/Greenfield contract was for Greenfield to run the Blankses' businesses, with the procurement of entertainment appearances being entirely collateral. (SAOB 15-16.)

Plaintiffs contend (without authority) that the central purpose of *every* contract between an artist and an unlicensed agent is necessarily the unlawful procurement of employment. (RB 51-53.) But each contract, each relationship, is different. In some, the agent's procurement duties may indeed "permeate" the relationship; in others, they may not—as when an actor's driver makes a phone call to a producer-friend to attempt to land the actor a role. Making that determination is what the severability analysis is all about.

---

[5] *Hyon v. Selten* (2007 Cal.App. LEXIS 1022), is not to the contrary. There, a partially unlawful contract was held not severable where "all of [the unlicensed individual's] claims required proof of the unlawful contract," and the contract provided for a "single consideration" (Civ. Code, § 1608)—a litigation contingency fee payable only if the unlawful services were performed. (*Id.* at *6-*7; see also *Keene v. Harling* (1964) 61 Cal.2d 318, 321, 324 [§ 1608 bars severance only where consideration is "indivisible," i.e., where "the illegal consideration on one side" can't be allocated to "some specified or determinable portion of the consideration on the other side"].) Here, Greenfield's right to payment for his lawful services did not depend on proof of his TAA services, and it was possible to allocate a portion of his compensation to TAA services.

If the line between activities that require a TAA license and those that don't is "murky," as plaintiffs claim, that weighs *in favor* of applying the discretion and equitable considerations that characterize severability analysis, rather than applying "a bright-line rule of non-severability," as plaintiffs urge. (RB 52-53.) It is reason to examine each case individually, not to impose a one-size-fits-all solution. Here, in any event, the line was clear and unambiguous.

E. Plaintiffs Dodge Their Failed Burden Of Proof.

Seyfarth showed that the Blanks/Greenfield contract was severable as a matter of law, and that Greenfield earned vastly more for his lawful activities (about $10,600,000) than for his unlawful activities (at most, $3,334). (SAOB 16 & fn. 7.) Plaintiffs claim this analysis rests on the incorrect assumption that "no license was needed for the $140 million NCP deal." (RB 53-55, 148-149.)[6] Plaintiffs assert there is "very little in the record concerning the NCP deal, and nothing at all supporting the defendants' assumption that the deal fell outside the scope of the TAA." (RB 54.)

Plaintiffs miss the crucial point: If the record fails to show that the lucrative NCP deal fell within the TAA, that is because *plaintiffs* failed to prove it did. That was *their* burden, because they had the burden to prove Greenfield's TAA violations in order to establish causation in the trial-within-a-trial. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832-833.) Their failure to prove the NCP deal fell

---

[6] The NCP deal was a long-term licensing agreement between Blanks and a marketing company. (See RB 5 & fn. 1; 10; 16 RT 2753 [Blanks: in NCP deal, "I licensed [Tae Bo] out to [NCP] for seven years"].) The approximately $10,600,000 the Blankses paid Greenfield reflected almost entirely Greenfield's share of the first payment ($30,000,000) they received for the NCP deal. (4 Ex.App. 147; RB 10.)

within the TAA left them with their own witnesses' undisputed testimony that Greenfield's unlawful activities earned him no more than $3,334. (SAOB 16 & fn. 7.)

Plaintiffs' failure to offer evidence on this issue was no slip-up. When pressed, plaintiffs' counsel declined to take a position. (6 RT F-133 ["We really don't take necessarily a position on this. . . . [I]t's not relevant. . . ."; Greenfield had "some interface with NCP. . . . Is that procurement? I have not taken a position on it"].) Plaintiffs are left with the record they created.

Finally, plaintiffs ask why, if defendants believed the TAA claim was worth only $3,334, they billed the Blankses over $400,000 to recover it. (RB 55.) The answer's easy: The complaint filed on the Blankses' behalf contained *16* causes of action *in addition to* the TAA claim, seeking millions in compensatory and punitive damages; and Greenfield's $49,000,000 cross-complaint had to be defended as well. (2 Ex.App. 267, 342, 366.)

F. Plaintiffs Overlook The Labor Commissioner's Discretion, The Equitable Nature Of Disgorgement, The Record, And Clear-Cut Instructional Error.

Seyfarth demonstrated that even where severability may not apply (as where all services required a license), and even where the Labor Commissioner has the power to totally void a contract, the Commissioner has exercised broad discretion to fashion appropriate remedies. (SAOB 20-21.)

Plaintiffs apparently concede this was the Commissioner's position before 1986—when, they incorrectly claim, the Legislature added the one-year statute of limitations to the TAA—but contend that after 1986 this discretion somehow disappeared. (RB 57-60.) Faced with the

Commissioner's unequivocal declaration, in 2001, that the TAA confers "broad discretion in fashioning a remedy that is appropriate under the facts of the case," and the Commissioner's refusal, based on equitable grounds, to order any disgorgement (*Kilcher v. Vainshtein* (Cal.Lab.Com., May 30, 2001) No. TAC 02-99, see RJN-AOB, pp. 196, 222), plaintiffs can only complain that *Kilcher* is "simply wrong" and "an anomaly." (RB 60.)

Nonsense. As shown, the statute of limitations was added in 1982, not 1986, and neither the TAA nor any legislative history suggests the Legislature intended to eliminate the Commissioner's traditional discretion in fashioning equitable remedies. Indeed, to our knowledge, the Commissioner has *never* denied this discretionary authority and has consistently recognized it, in *Kilcher* and other decisions. (See, e.g., *Hall v. X Management, Inc.* (Cal.Lab.Com., April 24, 1992) No. TAC 19-90, RJN-AOB, pp. 133, 168, 170, 182 ["In fashioning the appropriate remedy," Commissioner "has decided" it is "not appropriate to require all commissions to be disgorged"].)

Moreover, plaintiffs offer no effective response to Seyfarth's showing that *not a single appellate decision* holds total disgorgement is automatic under the TAA, and that California follows the rule that, absent statutory or judicial authority, a person who benefitted from and voluntarily paid for agreed services performed by an unlicensed person "'cannot

recover back the sum paid.'" (SAOB 21-23.)[7] Plaintiffs concede the rule may apply "in the abstract," but not to the TAA, relying primarily on *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572. (RB 60-61.) However, *Finnegan* involved neither the TAA nor a licensing scheme, but rather a statutory scheme barring public officials from retaining compensation earned under contracts in which they have a conflict of interest. (91 Cal.App.4th at p. 583 [contract is against "express prohibition of the law"].) Nothing in the TAA indicates an intent to depart from the general rule making payments already made to an unlicensed person for beneficial services non-recoverable.

Alternatively, plaintiffs argue that even if TAA disgorgement were discretionary, in this case discretion "could only have been exercised one way—by ordering complete disgorgement." (RB 62.) They assert—*with no record citation*—that "Greenfield did not contribute to Mr. Blanks' career." (RB 63.) The record, however, is to the contrary, at least with respect to the Blankses' non-entertainment ventures. (See SAOB 15-16 [Blankses contracted with Greenfield to "run all the aspects of our businesses," "especially the Studio," and Greenfield handled or oversaw all personnel matters, budgets, studio instructor certification, gym upkeep, studio expansion, parking, marketing, computers, book deal, t-shirt design and forming a foundation].) The very minor role Greenfield played in Blanks's *entertainment* career is reason to reject disgorgement, not apply it.

Finally, plaintiffs respond only in a footnote to the gross instructional errors concerning disgorgement. (SAOB 25-26.) Plaintiffs merely note that "the jury was instructed that 'The Labor Commissioner

---

[7] See also *Broffman, supra,* 213 Cal.App.3d at pp. 261-262 ("failure to be licensed merely prevents one who is required to be [licensed] from bringing or maintaining an action to recover compensation," not from "defending an action to recover compensation already paid to him").

considers both equitable relief and legal remedies.'" (RB 64-65, fn. 27.) Of course, the jury couldn't possibly have understood those undefined terms as meaning the Labor Commissioner has broad discretion to deny total disgorgement. The instruction did not begin to satisfy the rule entitling every party to correct instructions on each theory of its case. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

G. Plaintiffs Effectively Ignore Due Process.

1. Mandatory disgorgement of lawfully earned compensation where no economic loss was suffered offends due process.

Seyfarth demonstrated that if, as plaintiffs claim, the TAA required mandatory disgorgement in every case, whatever the circumstances, it would violate due process guaranties against arbitrary, excessive and unreasonable civil penalties. (SAOB 27.)

Plaintiffs contend that mandatory disgorgement "does not meet the definition of 'penalty.'" (RB 67-68.) Yet their own authority shows otherwise: *People v. Boudames* (2006) 146 Cal.App.4th 45, 51-53, a criminal case, distinguished "restitution" (defined as restoration of a victim's "economic loss," the "monetary value . . . of which he or she was deprived as a result of the wrongdoer's act") from a "penalty" (defined as "'suffering, in person, rights, or property, that is annexed by law . . . to the commission of a crime or public offense'"). Disgorgement under the TAA does not compensate for any "economic loss," since the artist has normally *benefitted* from the unlicensed agent's activity; rather, it is a penalty imposed for the "public offense" of procuring employment for an artist without a talent agency license. Indeed, plaintiffs' own TAA expert

testified that TAA disgorgement is "intended . . . to be punitive." (22 RT 4663:2-9.)

By any definition, mandatory disgorgement under the TAA is a penalty. That is exactly what the court held in *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626 ("the financial penalties to which the unlicensed agent is exposed are clearly sufficient to raise due process concerns"). Plaintiffs dismiss *Wachs* as involving different issues than here (RB 65); but as *Wachs* makes clear, it is the TAA's "financial penalties" that trigger concern about due process—whether that concern arises from vague statutory language (as in *Wachs)* or excessive disgorgement (as here).

Plaintiffs' attempts to distinguish Seyfarth's other authorities fare no better. In *Hale v. Morgan* (1978) 22 Cal.3d 388, 399, 404, it was not the fact that the statutory penalty had no time limit the court focused on, but rather that it was "mandatory in amount. . . . No discretion is permitted the trier of fact in fixing the penalty." (22 Cal.3d at pp. 399, 402 [the "exercise of a reasoned discretion is replaced by an adding machine"]; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313 ["We held (in *Hale*) that the statute in question violated . . . due process . . . because it did not permit the trial court any discretion in imposing the civil penalty"].) Similarly, in *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 692, it was not just the non-objective nature of trebling damages for mental suffering that offended due process. (RB 66; 226 Cal.App.3d at pp. 693-694, 696 ["financial impact" of automatic trebling of award would be "catastrophic" on defendant, exceeding 50 percent of his net worth].)

Unfathomably, plaintiffs rely on *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, which only confirms the applicability of *Hale* and *Balmoral* here. (RB 68-69.) *Suman* distinguished those cases because the statutory penalties in *Suman* were "not mandatory"; "the trier of fact

[had] discretion . . . to increase the basic damage award." (23 Cal.App.4th at pp. 11-12.) In contrast, the "legislation challenged in *Hale* and *Balmoral* . . . provided for *mandatory* civil penalties which"—as here—"had the potential of being very large." (*Id.* at p. 11, original emphasis.) If, as plaintiffs urge, the TAA requires mandatory disgorgement, leaving no discretion to the trier of fact, *Hale* and *Balmoral* apply here.

2. The "guidepost" analysis is relevant.

Seyfarth further demonstrated that the penalty here violates the constitutional due process "guideposts." (SAOB 28-31.) Plaintiffs refuse to address the guideposts, claiming they apply only to punitive damages, not civil penalties. (RB 69-70.) But courts have found the guideposts helpful in considering the constitutional excessiveness of civil penalties. For example, in a case involving statutory damages, this Court used them as an "*analogy* to standards for imposing punitive damages." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1318, emphasis added; see also *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1286 ["case law involving punitive damages is *instructive*" on sanctions issue], emphasis added.)

Moreover, as the Supreme Court recently observed, "It makes no difference whether we examine the issue as an excessive fine or a violation of due process" because the "'touchstone'" of the inquiry is always "'proportionality.'" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 [excessive fine analysis considers (1) defendant's culpability; (2) relationship between harm and penalty; (3) penalties imposed in similar statutes and (4) defendant's ability to pay].)

There's no getting around the need to analyze the mandatory disgorgement penalty for constitutional excessiveness. The sole case plaintiffs rely on, *People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002)

104 Cal.App.4th 508, (RB 69-70), does not hold otherwise. Although the court declined to employ a punitive damage analogy, it nevertheless employed a detailed excessiveness analysis. (*Id.* at pp. 514-522.)

H. Plaintiffs Misperceive The Disastrous Public-Policy Consequences Of Non-Severability.

Plaintiffs ignore our authorities establishing equity's abhorrence of forfeitures and disproportionate penalties. (SAOB 23-24.) Any deviation from bright-line rules, they say, would "take the teeth out of the TAA" and leave artists defenseless. (RB 47, 42-44.)

Plaintiffs are mistaken. Under the TAA, the Labor Commissioner might in one case determine that severance is appropriate under all the circumstances, but in another, determine—again based on the particular circumstances and equities—that severance is inappropriate, and declare the whole contract void *ab initio*. It is the Commissioner's "power" to do the latter that gives the TAA its "teeth."

Absent legislative directive, no other statutory scheme of which we're aware operates how plaintiffs say the TAA should—without equity, justice, discretion, or severability. These principles permeate the law. (See, e.g., Civ. Code, § 3359 ["Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered"].)

Severability accomplishes the Legislature's twin goals of deterring unlawful activity by unlicensed talent agents and ensuring the TAA does not operate to deprive individuals who assist artists in pursuing their careers of agreed-upon compensation for their lawful activities.

II. CAUSATION WAS LACKING BECAUSE THE UCL AND TAA CLAIMS WOULD HAVE PRODUCED THE SAME RECOVERY.

Seyfarth established that because the timely-filed UCL claim would have yielded no less than the TAA claim, loss of the TAA claim caused plaintiffs no damages. (SAOB 31-35.) Plaintiffs' responses—that the UCL claim was valueless because it was barred by the TAA's statute of limitations, and even if not barred, would have yielded only about $3,000 (RB 110-120)—do not fill the causation gap.

A. The TAA Does Not Preempt The UCL's Longer Statute Of Limitations.

Plaintiffs' position is apparently that, as in *Catch-22*, the UCL's remedies are available only if they are not needed: The TAA's one-year statute of limitations is an "absolute bar" that precludes recovery under the UCL. (RB 110-112.) Plaintiffs characterize the TAA's statute of limitations as a "strict substantive limitation on recoverable damages" that is "not subject to equitable tolling" or "delayed discovery." (RB 114.)

Plaintiffs' authorities do not support them; indeed, they demonstrate the UCL statute of limitations applies: "*Any* action on *any* UCL cause of action is subject to the four-year period of limitations created by that section." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179 [UCL "admits of no exceptions"].) The statute of limitations of the predicate statute is irrelevant. (E.g., *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 934, 942-943 [UCL claim

permitted recovery of unpaid wages for preceding *four* years, while Labor Code claim based on same practice limited recovery to *three* years].)[8]

Plaintiffs can't explain why the TAA's statute of limitations should be treated differently from all other statutes of limitations, or why it should apply to a claim brought under the UCL. (See *Styne, supra*, 26 Cal.4th at p. 53 [TAA's "actions and proceedings" clause "must be construed in the same fashion" as other statutes of limitations].) But even if the TAA statute of limitations did operate differently, the UCL claim here is not barred. The only absolute bar to UCL recovery arises not from a different limitations period, but when the *defendant's conduct* is protected by a statute—a "safe harbor." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 183-184 [if no statute provides safe harbor for defendant's conduct, court must determine whether "challenged conduct is unfair" within UCL's meaning].)

All plaintiffs' authorities exemplify "safe harbors." (See *Rubin v. Green* (1993) 4 Cal.4th 1187, 1202-1203 [litigation privilege immunized defendant from civil liability under any statute, including UCL]; *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 458-460 [failure to comply with predicate statute's pre-litigation notice requirement barred UCL action, because requirement created safe harbor for defendant to correct its conduct].)

When—as here—a statute provides no safe harbor, but merely restricts a right of action against conduct that remains unlawful, UCL recovery is not barred. (E.g., *Cortez, supra*, 23 Cal.4th at pp. 178-179;

---

[8] *Janik* makes clear it would have been malpractice for Seyfarth *not* to have brought the UCL claim. (119 Cal.App.4th at p. 943 [attorneys "duty bound" to investigate UCL claim based on same conduct as violation of other statute].)

People v. McKale (1979) 25 Cal.3d 626, 632 [approving UCL claim by district attorney although he lacked standing under predicate statute].)

Moreover, far from destroying an unidentified legislative "balance" (RB 113), the UCL's expansion of artists' recovery rights actually promotes the balance the Legislature created by authorizing a greater penalty where conduct does not simply violate the TAA, but also constitutes an unlawful business practice under the UCL.

B. Here The UCL Provides The Same (Or Greater) Recovery Than The TAA.

Plaintiffs argue that a UCL claim is not an all-purpose substitute for a TAA claim. (RB 116-119.) Seyfarth makes no such claim—just that an award under the UCL would have been no less than under the TAA.

The UCL entitled plaintiffs to restitution by Greenfield of any gains from his unlicensed (therefore illegal) activities. (Bus. & Prof. Code, § 17203.) Plaintiffs claim that amount would have been only about $3,000—the compensation attributable to Greenfield's illegal conduct. (RB 118-119.) Of course, plaintiffs reach this result only by *applying severability*. Yet, out of the other side of their mouth, they argue the same illegal conduct *is not* severable because it is "functionally indistinguishable" from Greenfield's legal conduct. (RB 51-52 ["*all* activities" were to advance Blanks's career "and were thus not severable"].)

The severability of illegal from legal conduct does not depend on whether the action is brought under the TAA, the UCL, or both. If, as Seyfarth contends, severability applies, recovery under either statute would be limited to amounts Greenfield received for illegal procurement. But if severability does not apply, and all Greenfield's services somehow violated

the TAA, then they also violated the UCL. The UCL's restitutionary award would be no less than that under the TAA.[9]

III. EVIDENTIARY AND INSTRUCTIONAL ERRORS FORECLOSED THE REQUIRED "TRIAL-WITHIN-A-TRIAL."

In any legal malpractice case that claims a lost lawsuit, it is plaintiffs' burden to present a trial-within-a-trial—"part and parcel of the element of causation" of damages. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 970; *Mattco Forge, supra*, 52 Cal.App.4th at pp. 832-833; SAOB 35.) There was no trial-within-a-trial here.

In a trial-within-a-trial, the legal-malpractice jury decides the underlying case that was allegedly lost. It hears the evidence that should have been presented in an untainted trial and renders its decision according to the law that should have been applied, isolating the damages caused by the alleged misconduct.

Fundamental errors here prevented a trial-within-a-trial:

- Plaintiffs and the judge focused the trial on what actually *did happen* in the underlying proceedings, preventing any independent determination of what *should have happened* in untainted proceedings. (SAOB 42-44.)

---

[9] Plaintiffs' purported distinction between restitution and disgorgement (RB 119, fn. 39) is a red herring. As their own quote from *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 makes clear, it is only "nonrestitutionary disgorgement" that cannot be recovered under the UCL. As Seyfarth explained (SAOB 19-20, fn. 10; 33-34), in this case restitution and disgorgement are the same, since all monies disgorged by the payee (Greenfield) would be awarded to the payor (Blanks), not a third party.

- Witness after witness testified about the law and how it should be applied to the facts. That would be error in any trial; here, it also precluded a trial-within-a-trial. (SAOB 36-41.)
- The jury was not instructed how to accomplish—or even that it *should* accomplish—a trial-within-a-trial. Nor was it told to disregard all evidence about the actual underlying proceedings. (SAOB 43-45.)

Plaintiffs' response to these errors wholly fails to address the real prejudice—that they foreclosed the requisite trial-within-a-trial.

A. Evidence About The Underlying Proceedings Prevented A Trial-Within-A-Trial.

The evidence "about what happened" in the underlying proceedings was *inadmissible* for exactly the purpose plaintiffs say it was *admitted*: to show causation and damages. (RB 123; 6 RT F-140, 143.) The underlying proceedings and their aftermath, plaintiffs proclaim, were what the trial was all about. (RB 122-123, citing 6 RT F-138-139, 140.) Our point, exactly. That was the error.[10]

1. The evidence was irrelevant.

The trial court ruled and instructed the jury that defendants breached their professional duties. (12 AA 2512.) The remaining issues were defendants' intent (on the intentional tort claims) and damages caused by

---

[10] Plaintiffs recast some of the trial court's statements to make them more palatable. For example, the court did not say this case is about "the late-filed petition" (RB 122-123); it said the case is about "the Labor Commissioner's ruling and the basis of the Labor Commissioner's ruling . . . ." (6 RT F-143:6-7.)

loss of the TAA claim. Those damages could only be established by an untainted trial-within-a-trial of the underlying claims. (See SAOB 35.)

The trial-within-a-trial burden applied equally to all plaintiffs' causes of action—malpractice, fraud, and breach of fiduciary duty—because all were based upon the same alleged loss of the TAA claim. That's what this Court held in *Mattco Forge* when it reversed the entire judgment—including fraud verdicts—because there was no proper trial-within-a-trial. (52 Cal.App.4th at pp. 835-837.) Opinions about what went wrong in the underlying proceedings could not establish what would have happened had things gone right.

But the jury, hearing little evidence that might establish Greenfield's actual TAA violations, had every reason to rely instead on testimony about the hearing officer's conclusion and what various attorneys thought about it. (See SAOB 39, 43-44.) That improper focus defeated plaintiffs' obligation to establish causation.

2. The evidence supplanted the required trial-within-a-trial.

Plaintiffs facilely dismiss *Mattco Forge* as "not applicable" and *Piscitelli* as "inapposite." (RB 124-125, 132, fn. 44.) Both cases reversed judgments because the errors (improper jury instructions in *Mattco Forge*; improper expert testimony in *Piscitelli*) focused the trial on the underlying proceedings rather than on a trial-within-a-trial untainted by the claimed malpractice. (*Mattco Forge, supra,* 52 Cal.App.4th at p. 839; *Piscitelli, supra,* 87 Cal.App.4th at p. 974.)

This trial suffered from the same defect: Evidence focusing on the underlying proceedings was the heart of plaintiffs' case—"perhaps the most important, relevant evidence in this action," according to plaintiffs. (6 AA 1308:9-10, 1310:14-15; SAOB 42-44.)

Instead of the proof against Greenfield showing "what would have happened had the lawyer acted otherwise," the jury heard a parade of lawyers testify about what *did* happen when the lawyers *did not* act otherwise. There was only sketchy evidence about artistic engagements Greenfield had sought or procured and what earnings they may have produced. (See above, § I.E.) Having heard mountains of testimony characterizing the underlying proceedings,[11] and never being told that evidence was irrelevant, the jury could hardly have ignored it. (*Piscitelli, supra*, 87 Cal.App.4th at p. 974 [expert testimony about underlying proceedings prevented trial-within-a-trial].)

B. Improper Testimony About The Law And Its Application To The Facts Prevented A Trial-Within-A-Trial.

Plaintiffs concede that expert testimony on the law generally should be excluded, but argue it was appropriate (or at least not prejudicial) here. (RB 121.) Their response sidesteps most of the errors and all the relevant authorities.

[11] E.g., 12 RT 1705; 15 RT 2497-2506, 2510-2516, 2520-2527, 2531-2532, 2534-2540, 2542-2544, 2547-2566; 22 RT 4657, 4664-4673; 23 RT 4860-4863, 4941-4968; 24 RT 5102-5115, 5172-5173; 26 RT 5468-5477.

1. Opinion testimony about the law and interpretation of the evidence was improper.

Witnesses may not testify about the law governing the issues to be decided. That task is exclusively the court's. (Evid. Code, § 801; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884 ["'experts may not give opinions on matters which are essentially within the province of the court to decide'"]; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1634-1635.) Plaintiffs' authorities generally affirm trial courts' broad discretion, but none suggests a court has discretion to permit expert testimony about governing law. (RB 127-128; see SAOB 36.)

Nor may witnesses tell the jury what conclusions it should draw from the evidence. That's the role of argument. (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 290-292; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 [expert's opinion about how case should be decided "does not aid the jurors, it supplants them"].)

Expert testimony about the law and its application is likely to prejudice any trial. Potential for confusion is great when jurors are confronted by differing opinions "'over the principles applicable to the case'"; moreover, such opinion testimony "'suggest[s] that the judge and jury may shift responsibility for decision to the witnesses.'" (*Summers*, *supra*, 69 Cal.App.4th at pp. 1182-1183.) Here, there was additional prejudice: The use of improper testimony to prove causation defeated the essential trial-within-a-trial. Testimony that plaintiff would have prevailed before the Labor Commissioner "misconceived the jury's function" in the trial-within-a-trial, leaving the jury with "improper expert testimony on which to base its decision." (*Piscitelli*, *supra*, 87 Cal.App.4th at pp. 973, 976.)

2. Plaintiffs ignore most of the challenged evidence.

Plaintiffs argue the challenged testimony was admissible to answer this question: "[W]hat would defendants have understood the law to mean?" (RB 129.) But much of the challenged evidence was not about defendants' state of mind at all. It told the jury less about what *defendants* had thought than what *plaintiffs' witnesses* thought about the law and the facts, e.g., that Seyfarth caused the Blankses to lose a $10,600,000 recovery; that only the TAA offered the Blankses a viable remedy; and that Seyfarth intentionally breached its duties. (SAOB 24-26, 37-39). Plaintiffs leave these errors unanswered. Nor do they explain how "expert" testimony about defendants' state of mind could be admissible; that is for the jury to determine from the evidence. (See § III.B.1, above.)

Plaintiffs deny the evidence was about matters "'essentially within the province of the court to decide.'" (RB 128-129.) But if the jury needed to be told about "disgorgement under the Act," about defendants' fiduciary duties, or that the non-TAA claims were valueless as a matter of law, as plaintiffs argue (*ibid*.), it was the trial court's job to instruct on those subjects. It could not delegate that task to expert witnesses—as it repeatedly did. (SAOB 36-39.)

Seyfarth's authorities are not trumped by *Neal v. Farmers Ins. Exchang*e (1978) 21 Cal.3d 910. (RB 130.) *Neal* held that in some cases expert testimony may be used to establish causation. But *Neal* did not involve a malpractice case or a trial-within-a-trial—"the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation." (*Mattco Forge, supra*, 52 Cal.App.4th at p. 834.) Moreover, *Neal*'s language, viewed in context, is not as broad as plaintiffs contend. (See *Summers*, *supra*, 69 Cal.App.4th at p. 1180 [*Neal* approves expert testimony only about factual issues, not the law].)

3. The challenged testimony usurped the court's role.

Plaintiffs suggest that the challenged testimony about the law, even if inadmissible, was *not incorrect*, and therefore caused no prejudice. (RB 132-133; see also 11 RT 1240-1245.) They are doubly wrong.[12]

More fundamentally, however, plaintiffs' "no-harm-no-foul" response misses the point. The question is not whether some of the testimony accurately stated the law. When the jury must weigh experts' opinions to determine the law, its fact-finding function is waylaid. That is why expert testimony on the law—no matter how accurate—"'is detrimental to the trial process.'" (*Summers, supra*, 69 Cal.App.4th at p. 1182.)

C. Lack Of Instructions On The Jury's Trial-Within-A-Trial Duties Doomed The Trial-Within-A-Trial.

Although establishing causation was plaintiffs' burden, and a trial-within-a-trial was the only way to meet that burden, plaintiffs requested no instructions to guide the jury through the "burdensome and complicated"

---

[12] Plaintiffs' witnesses misstated the law. (See SAOB 24-25, 39, fn. 17.) For example, the TAA did *not* constitute the Blankses' only possible remedy (22 RT 4667); the Miller-Ayala Act does *not* apply only to athletes on professional sports teams (22 RT 4668); the TAA's remedies would *not* necessarily "have gotten them back all their money" (22 RT 4669); lawful aspects of an agreement involving a TAA violation will *not* invariably be declared void (22 RT 4666-4667).

trial-within-a-trial process. (*Mattco Forge*, *supra*, 52 Cal.App.4th at p. 832.)

Adverting broadly to all the jury instructions, plaintiffs argue that the jury had sufficient guidance about its trial-within-a-trial duties—without specifying which of the 131 instructions could possibly have done the job. (RB 134.) In fact, not one of them gave the jury a clue it must determine what an objectively reasonable judge or jury should have done; nor that it must base its determination only on evidence of Greenfield's actual conduct, wholly disregarding all the testimony about the underlying results and proceedings—what plaintiffs touted as "the most important, relevant evidence in this action." (6 AA 1308:9-10, 1310:14-15.) Even defendants' bare-minimum last-resort instructions were rejected as unnecessary. (12 AA 2628; 29 RT 6919-6922 [court rules that instruction focusing on objective nature of trial-within-a-trial is unnecessary]; see also 12 AA 2671; 29 RT 6991-6995; SAOB 45.)[13]

D. Prejudice Is Manifest.

The prejudice from these errors was not just that they left the jury without guidance after being pelted for days with inadmissible evidence; they also enabled plaintiffs to obtain a $30 million judgment without proving the essential elements of their claims.

Evidence about what the Labor Commissioner did in earlier proceedings—or expert testimony about what he would, could, or should have done—was inadmissible to prove Blanks's underlying case against Greenfield. (*Piscitelli*, *supra*, 87 Cal.App.4th at p. 973; see *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-777 ["proof of causation

---

[13] Defendants objected that the evidence and instructions were insufficient to meet plaintiffs' trial-within-a-trial burden. (29 RT 6991-6994.)

cannot be based on . . . an expert's opinion based on inferences, speculation and conjecture"].)[14] Even if the jury somehow could have disregarded the evidence plaintiffs intentionally presented as the trial's central focus, it was never instructed to do so.

In light of these errors, the requisite trial-within-a-trial did not occur at all.

IV. THE PUNITIVE AWARD MUST BE REVERSED WITH DIRECTIONS.

A. No "Managing Agent" Committed Or Ratified Any Wrongdoing.

1. The "managing agent" standard applies to Seyfarth.

Seyfarth demonstrated that the $15,000,000 punitive award cannot stand because Lancaster was not a "managing agent" of Seyfarth and no other "managing agent" ratified his purported churning scheme. (SAOB 45-51.) Plaintiffs' primary response is that the "managing agent" standard applies only to formal corporations, not limited liability partnerships like Seyfarth. (RB 135-137.) They cite no supporting authority, because there is none.

---

[14] It is no answer (even if true) that defendants elicited some inadmissible testimony. (RB 123, fn. 41.) After the court ruled the inadmissible evidence would be the trial's focus, and repeatedly overruled objections to it, defendants were not obligated to acquiesce. (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 299, fn. 17 [after objection overruled, "'appellant . . . could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action'"].)

Plaintiffs assume that the terms "corporate employer" and "corporation" as used in Civil Code section 3294, subdivision (b), cannot refer to a law firm partnership. Not so. A dictionary definition of "corporation" is "any group of persons united or regarded as united in one body," and the dictionary defines "corporate" as "pertaining to a united group, as of persons: the corporate good." (Random House Unabridged Dict. (2d ed. 1993) p. 454, col. 1.) A law firm partnership such as Seyfarth is unquestionably a united group of persons that can act in a "corporate" manner.

This is exactly the sense in which the court in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, understood the term when it applied section 3294's "managing agent" standard to a law firm partnership. (*Id.* at p. 1159 [referring to "Baker & McKenzie's failure to take *corporate* responsibility for [its partner's] behavior" and to Baker & McKenzie's "*corporate* desire to avoid alienating a productive partner"], emphases added.)

That the Legislature intended this broad definition is unmistakably clear from the legislative history of section 3294. The Legislature's goals in enacting subdivision (b) "were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, citing with approval *Weeks, supra*, 63 Cal.App.4th at pp. 1150-1151 and *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712-713.) Neither the statute nor its legislative history suggests these protections were intended to apply only to formal corporate entities. (*College Hospital, supra*, 8 Cal.4th at p. 721 ["The statute does not purport to exclude any particular type of employer . . . from its coverage"].)

Plaintiffs' attempts to diminish the significance of *Weeks* are unavailing. They claim the court "did not discuss the business structure" of Baker & McKenzie (RB 136), but the court used the term "partnership" or "partner" no fewer than 15 times. Moreover, nothing in *Weeks* supports plaintiffs' suggestion that it mattered that the conduct triggering the punitive award was employment-related, not client-related. (RB 136 & fn. 46.) A law firm's punitive liability—there and here—depends not on the nature of the underlying misconduct, but on what the firm knew and who knew it.

2. Lancaster was not a "managing agent."

a. Lancaster did not have or exercise policy-making authority.

The term "managing agent" includes only those "who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White, supra*, 21 Cal.4th at p. 573; see also *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 716.)

Plaintiffs virtually ignore *White* and its progeny, relying on an earlier case, *Egan* v. *Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809. (RB 138-142.) But *Egan* predated the Legislature's adoption of the "managing agent" standard in 1980, and the Supreme Court granted review in *White* expressly to resolve the conflicting decisions about the breadth of the term. (*White, supra*, 21 Cal.4th at p. 566.) That happened in 1999—20 years after *Egan*. *White* rejected the broad characterization of "managing agent" plaintiffs urge here, specifically approving this Court's narrow application in *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421-422. (*White, supra*, 21 Cal.4th at pp. 566-567, 573-574 [endorsing *Kelly-Zurian*'s holding that supervisor not "engaged in policymaking," without

"authority to establish or change the company's business policies," was not "managing agent"].)

In any event, *Egan*'s result is consistent with *White*. McEachen, the insurance claims manager found to be a "managerial employee" in *Egan*, had "policy-making authority," managed "the Los Angeles claims department for Mutual," and had "ultimate supervisory and decisional authority regarding the disposition of all claims . . . processed through the Los Angeles office. . . . The authority exercised by McEachen and Segal necessarily results in the ad hoc formulation of policy." (*Egan, supra,* 24 Cal.3d at p. 823.)[15]

The record is devoid of evidence that Lancaster—a brand-new partner among hundreds of other partners—had policy-making authority at Seyfarth. He was not a "managing agent."

b. *Virtanen v. O'Connell* is directly on point.

Plaintiffs claim *Egan* arose in "a very similar factual setting to the present case." (RB 137-138.) But they ignore a decision that arose in precisely the *same* setting—where a principal of a large law firm was held not to be a "managing agent." (*Virtanen, supra,* 140 Cal.App.4th 688.)

A seller of shares of stock (Virtanen) sued the buyer's attorney (O'Connell) and law firm (Parker Milliken) for misconduct, but failed to obtain a punitive award against either. (*Id.* at pp. 692-694, 696.) The evidence showed O'Connell single-handedly managed the stock transaction, making all strategic decisions and taking all actions without supervision, and was a shareholder and agent of Parker Milliken. (*Id.* at pp. 693, 697,

---

[15] Segal, a claims adjuster, "also possessed broad discretion" and thus was treated as a "managerial employee" along with McEachen. (*Id*. at pp. 816, 823.)

713-716.) Nevertheless, the court held "there is no evidence to show that he was a 'managing agent' of Parker Milliken within the meaning of Civil Code section 3294" and *White v. Ultramar*, because "no evidence whatsoever [showed] that O'Connell exercised substantial discretionary authority over significant aspects of Parker Milliken's business." (*Id.* at p. 716.)

Contrary to plaintiffs' argument (RB 139-141), the fact that a lawyer may be "the face" of his law firm to clients and others, may "oversee [his] own cases," and may be "trusted [by clients] to protect their rights," does not make him a "managing agent" under Civil Code section 3294—as *Virtanen* holds. As in *Virtanen*, no evidence showed Lancaster was in a policy-making position at Seyfarth. (See SAOB 47-49; *E.E.O.C. v. Sidley Austin Brown & Wood* (7th Cir. 2002) 315 F.3d 696, 702-703 [law firm of over 500 partners cannot be treated as if each partner had management role].)

3. No evidence showed ratification by any managing agent.

Plaintiffs concede that "ratification in the punitive damages context requires *actual knowledge of the conduct and its outrageous nature.*" (RB 143, quoting *College Hospital, supra,* 8 Cal.4th at p. 726, emphasis added.) Yet they do not claim George Preonas—or anyone else in Seyfarth's management—had such knowledge. All they say is that "Preonas was aware that Seyfarth was handling the Blanks' claim" and that he advised an associate about Labor Commissioner proceedings. (RB 144.)

This is not clear and convincing evidence of ratification. It is far less even than the evidence the Supreme Court found insufficient to establish ratification in *College Hospital*. There, hospital administrator Westbrook

"heard 'third hand'" that employee Berry might be having a relationship with a patient; Westbrook advised Berry against having a non-casual relationship with a patient but took no further action. (8 Cal.4th at pp. 724-725.) The Court concluded that "[u]nder no view" could "Westbrook's conduct be characterized as ratification" of Berry's sexual relationship with the patient, since there was no evidence he "knowingly approved" Berry's misconduct. (*Id.* at pp. 726-727.)

Here, there was not even a rumor that Lancaster was mishandling plaintiffs' case or evidence that Preonas had heard such a rumor, much less that Preonas "knowingly approved" anything. An organization cannot ratify what its managing agents do "not actually know about." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168.)

Plaintiffs cite *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 68, for the proposition that "[t]urning a 'blind eye' to misconduct that can readily be observed is itself evidence of ratification." (RB 144.) But plaintiffs do not say what misconduct could "readily be observed" by Preonas or anyone else. Nor do they mention that *Ajaxo* was not decided under section 3294 or *College Hospital*'s "actual knowledge" rule but under a different statutory scheme altogether. (135 Cal.App.4th at pp. 66-67.)

Plaintiffs also cite two decisions apparently for the proposition that ratification can be shown by "'the opportunity to learn of the misconduct'" as well as by actual knowledge of it. (RB 144-145.) But neither case so holds; both involved actual knowledge. (*Pusateri v. E.F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 252 [managing agent had "knowledge of the apparent churning activities"]; *J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union* (1989) 208 Cal.App.3d 430, 445 [labor union did not dismiss officers when it "learned of their wrongdoing"].)

B. The Award Is Constitutionally Excessive.

Seyfarth demonstrated that the $15,000,000 punitive award is excessive under each of the Supreme Court's guideposts. (SAOB 51-55.) None of plaintiffs' responses (RB 145-151) withstands scrutiny.

1. The conduct is low on the reprehensibility scale.

Since a punitive award involves reprehensible conduct by definition, "it is the degree of the reprehensibility, not its existence in an absolute sense that is the critical factor." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1288.) The Supreme Court identifies five factors to measure reprehensibility: whether (1) the harm was physical or merely economic; (2) the misconduct threatened health or safety; (3) the plaintiff was financially vulnerable; (4) the misconduct was isolated; and (5) there was malice, trickery, or deceit. (SAOB 52.)

Plaintiffs do not dispute that the first three factors are inapplicable here. Their reliance on the remaining two factors fails.

First, Seyfarth cannot have acted with intentional malice, trickery, or deceit because no evidence showed any managing agent at the firm knew about any claimed misconduct. (§ IV.A, above.)

Second, that the misconduct allegedly occurred over the course of a year does not mean it was not "isolated." Both the federal and California Supreme Courts have rejected such an argument, pointing to the absence of evidence that the defendant engaged in the same type of misconduct in other relationships or transactions. (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419, 423 [although defendant altered company records, improperly prosecuted lawsuit, and misled insured throughout litigation, defendant could not be punished as recidivist because of "scant evidence of repeated misconduct of the sort that injured

(plaintiffs)"]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2006) 35 Cal.4th 1159, 1180 [although deceptive conduct spanned several weeks, "no evidence indicated (defendant) acted similarly" in other transactions].)

Deviating from the *Campbell* factors, plaintiffs argue high reprehensibility based on claims they were emotionally vulnerable and had a fiduciary relationship with Seyfarth. (RB 146.) Plaintiffs point to no evidence they were particularly emotionally vulnerable, nor do they acknowledge the relevant focus is on financial, not emotional, vulnerability. (E.g., *Simon*, *supra*, 35 Cal.4th at p. 1180 [neither party depended on transaction "for economic survival or security"].) And while Seyfarth may have been a fiduciary, and while a breach of fiduciary duty may *justify* a punitive award, it does not mean that such misconduct scores high on the reprehensibility scale. (*Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 4, 11 [reversing punitive award against fiduciary; see § 2, below].)

2. The ratio of punitive to compensatory damages highlights the award's excessiveness.

Although the punitive-to-compensatory ratio appears to be 1.5:1, as Seyfarth has explained, it is actually closer to 30:1 because of the non-compensatory nature of the so-called "compensatory" award in this case. (SAOB 53-54.) Plaintiffs challenge that analysis, asserting that the entire $10,000,000 award is compensatory, because it reflected ill-gotten gains. (RB 148.) But even if that characterization were correct (it's not), the ratio guidepost points unmistakably to excessiveness.

The Supreme Court has cautioned that "[w]hen compensatory damages are substantial," punitive damages *equal to* compensatory damages "can reach the outermost limit of the due process guarantee." (*Campbell*,

supra, 538 U.S. at p. 425; *Simon*, *supra*, 35 Cal.4th at p. 1183.) The $10,000,000 compensatory award here is undeniably substantial. (*Campbell*, *supra*, 538 U.S. at p. 426 [$1,000,000 award substantial]; *Jet Source Charter*, *supra*, 148 Cal.App.4th at p. 11 [$6,500,000 award substantial].) The ratio analyses in cases not involving substantial compensatory damages—including cases plaintiffs cite in support of a 1.5:1 ratio—therefore are inapposite. (RB 149, fn. 48 [citing cases where compensatory award was approximately $165,000].)

Jet Source is directly on point. Defendant aircraft dealers were fiduciaries found liable for stealing from their beneficiary through a "fraudulent scheme," leading to a $6,500,000 compensatory award. (148 Cal.App.4th at p. 7.) Describing that award as "to say the least, substantial," the court ordered the $26,600,000 punitive award reduced to an amount that "does not exceed the compensatory damages"—i.e., from a ratio of 4:1 to, at most, 1:1. (*Id*. at pp. 4, 11.) The court held:

> Where, as here, substantial compensatory damages have been awarded, and the conduct in question only involves economic damage to a single plaintiff who is not particularly vulnerable, an award which exceeds the compensatory damages awarded is not consistent with due process. (*Id*. at p. 4.)[16]

3. The award vastly exceeds penalties for similar conduct.

Seyfarth showed that the punitive award dwarfs analogous civil penalties. (SAOB 54-55.) In response, plaintiffs point to our Supreme Court's statement that the third guidepost is "less useful" in cases involving

---

[16] See also *Bach v. First Union Nat. Bank* (6th Cir. 2007) 486 F.3d 150, 157 [reducing $2.2 million punitive award to $400,000 for a 1:1 ratio, the "outer boundary of what the Constitution will permit"]; *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790, 799 [1:1 ratio is constitutional maximum where compensatory damages are $600,000].

common law tort claims. (RB 150.) But that does not mean it is useless. Even in the case plaintiffs cite, the Court considered analogous civil penalties in determining the punitive award was excessive. (*Simon, supra*, 35 Cal.4th at p. 1184.) Moreover, that the remaining guidepost is "less useful" in no way demonstrates the punitive award is constitutional. If anything, it increases the importance of the other two guideposts—which, as shown above, compel a finding that the $15,000,000 award was grossly excessive.

V. THE COMPENSATORY AWARD VIOLATES THE RULE AGAINST BASING LEGAL MALPRACTICE AWARDS ON LOST PUNITIVE DAMAGES.

Seyfarth explained that the compensatory award must be reversed under the reasoning of *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (lost punitive damages unrecoverable as compensatory damages in legal malpractice action), because the compensatory award here consisted entirely of recovery for lost civil penalties functionally equivalent to punitive damages. (SAOB 55-57.)

Plaintiffs attack "the underlying premise" of our argument, mischaracterizing that premise as "the compensatory award has a punitive component because it contains non-TAA amounts." (RB 152.) But our *Ferguson* argument is expressly premised on the proposition that *all* sums awarded under the TAA are punitive, not compensatory. (SAOB 55 [because "*any* TAA award to Blanks from Greenfield in the underlying case would not have compensated for any loss—it would have been a civil penalty"], emphasis added.)

Plaintiffs next argue that none of the rationales for the *Ferguson* rule apply here. They are wrong:

- Although this is not a class-action case (and therefore *Ferguson*'s sole case-specific rationale is inapplicable here), *Ferguson* clearly applies outside the class-action setting. (See, e.g., *Expansion Pointe Properties Limited Partnership v. Procopio, et al.* (2007) 152 Cal.App.4th 42.)

- As in *Ferguson*, recovery of lost penalty damages here "would defeat the very purpose behind such damages," because it would "neither punish the culpable tortfeasor . . . nor deter that tortfeasor and others from committing similar wrongful acts in the future . . . ." (*Ferguson, supra*, 30 Cal.4th at pp. 1046-1047.) Making the defendant attorneys pay the TAA-imposed penalties neither punishes the unlicensed agent nor deters others from TAA violations.[17]

- Plaintiffs' claim that a TAA award is less "speculative" than a punitive award (RB 153-154) depends entirely upon the validity of their non-severability argument, i.e., that disgorgement of all contract payments is automatic. But even if they were correct (they're not), quite apart from severability, the Labor Commissioner exercises broad discretion in determining the penalty to impose in each case, considering such factors as intent, malice, and proportionality. (See SAOB 20-21.) These considerations are the same as those employed in the essentially "subjective" process of determining punitive damages. (*Ferguson, supra*, 30 Cal.4th at pp. 1048-1049.)

- Contrary to plaintiffs' argument (RB 154), a malpractice jury's attempt to replicate the Labor Commissioner's exercise of discretion in a trial-within-a-trial requires as daunting "mental gymnastics" as replicating a punitive-damage determination.

---

[17] Plaintiffs' response—a summary of their arguments against severability (RB 153)—is a non sequitur.

- Plaintiffs don't really deny that here, as in *Ferguson*, there would be a "significant social cost" of increased legal malpractice premiums and reduced availability of insurance (*Ferguson, supra*, 30 Cal.4th at p. 1050); instead, they argue it cannot be the *only* consideration. (RB 155.) So what? The result is clear: All the reasons that lost punitive damages generally are not recoverable as compensatory damages in legal malpractice actions apply equally here, where the malpractice claim was based on a lost non-compensatory TAA award.

CONCLUSION

For all these reasons, the judgment should be reversed.

Dated: July ___, 2007

MOSCARINO & CONNOLLY LLP
John M. Moscarino
Joseph Connolly
Paula C. Greenspan

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland
Barbara W. Ravitz
Peter O. Israel
Alana B. Hoffman

By_____
Barbara W. Ravitz

Attorneys for Defendant and Appellant
SEYFARTH SHAW LLP

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this **Appellant Seyfarth Shaw LLP's Reply Brief** contains 10,743 words, not including the Certificate of Interested Entities or Persons, tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: July ___, 2007

_____

Barbara W. Ravitz